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No. 91-431

In The

Supreme Court of the United States

October Term, 1991

ROBERT F. MURPHY,

Petitioner,

v.

KLEIN TOOLS, INC.,

Respondent.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

ROBERT J. O'CONNOR*
DAVID E. BENGTSON
HERSHBERGER, PATTERSON, JONES & ROTH
100 S. Main, Suite 600
Wichita, KS 67202-3779
(316) 263-7583

ROBERT E. ARROYO
KECK, MAHIN & CATE
8300 Sears Tower
233 S. Wacker Dr.
Chicago, IL 60606-6589
(312) 876-3400

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the unique facts of this case prevent definition of an issue worthy of examination by this Court?

Whether on the facts of this case the dismissal "with prejudice" by the Kansas federal district court on statute of limitations grounds bars Petitioner's subsequent identical action in federal district court in New Mexico?

RULE 29.1 LIST

Respondent Klein Tools, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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Respondent Klein Tools, Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 935 F.2d 1127 (1991).

STATEMENT OF THE CASE

Respondent generally concurs with the factual statement of the case set forth in the Petition. However, the following material facts concerning the history of this lawsuit were omitted therefrom:

On August 22, 1988, the Kansas district court sustained Respondent's motion for summary judgment holding that Petitioner's claims were barred by the applicable statute of limitations. Petitioner filed that case on August 12, 1983. Respondent specifically raised the statute of limitations defense in its timely filed answer. Respondent's motion for summary judgment raising the statute of limitations defense was filed on February 12, 1988.

On February 20, 1989, Petitioner filed an identical case raising the same cause of action in New Mexico state court. Petitioner filed an amended complaint in that case on April 24, 1989. No service of process was attempted or made in that case.

On August 14, 1989, petitioner filed a motion asking the Kansas district court to specify that its order of dismissal, which had not yet been issued, would be "without prejudice."

On September 1, 1989, Petitioner filed a second action in New Mexico state court. This action ultimately was served on Respondent. That action was removed by Respondent to the United States District Court for the District of New Mexico and is the action which ultimately gives rise to the instant matter.

On September 5, 1989, the Kansas district court entered a final judgment stating that Petitioner's "action

is dismissed *with prejudice* for failure to file it within the limitation period of K.S.A. 60-513." (emphasis added) Petitioner did not move the district court to modify that judgment nor did he appeal it to the Tenth Circuit Court of Appeals.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below was based on the unique facts of this case and is not controlled solely by the Tenth Circuit's interpretation of Rule 41(b).

A. The Kansas district court judgment, which was not appealed and was not at issue in the case below, expressly stated that the dismissal of the Petitioner's action was "with prejudice".

The Tenth Circuit's determination that the Kansas district court's judgment was "on the merits" was based on the express language of that judgment which stated that the dismissal was *"with prejudice."* In the Kansas action, Petitioner filed a motion specifically requesting that the court specify that its dismissal would be "without prejudice." Petitioner, therefore, was keenly aware of the significance of a dismissal of his Kansas action "with prejudice." Inexplicably, but significantly, Petitioner chose not to appeal the Kansas judgment and the propriety of that judgment was not in issue in this case.

The Tenth Circuit's decision was not based solely on its construction of Rule 41(b), but was primarily based on the fact that the Kansas district court's dismissal was expressly "with prejudice." Specifically, the Tenth Circuit stated:

> The district court of Kansas dismissed plaintiff's claim, specifying that the dismissal judgment was *with prejudice*. We do not decide whether this decision was correct. However, we must assume that plaintiff had no quarrel with the decision as he elected not to appeal. '[A]n erroneous judgment fairly and regularly entered by a court of competent jurisdiction is nevertheless an effective bar under the doctrine of res judicata to a subsequent action between the same parties on the same cause of action.' *Stokke*, 169 F.2d at 43. When plaintiff took no appeal, the Kansas judgment became final. We conclude the judgment was on the merits and thus res judicata as to subsequent actions. Plaintiff cannot forum shop in an effort to remedy his unexplained delay.

Murphy v. Klein Tools, Inc., 935 F.2d 1127, 1129 (10th Cir. 1991). Therefore, the Tenth Circuit held that the Kansas dismissal, which was expressly stated to be "with prejudice", was a judgment "on the merits" for purposes of res judicata. Contrary to Petitioner's contention, the Tenth Circuit did not necessarily adopt a "blanket rule" that all dismissals on statute of limitations grounds were "on the merits" for purposes of res judicata.

B. Petitioner's own lack of diligence in prosecuting his action extinguished his substantive rights.

Petitioner contends that the concept of federalism should not allow a federal procedural rule to extinguish his alleged substantive rights under state law. This argument misses the point. Plaintiff's substantive rights under

state law were barred by his own, or his counsel's, failure to file his action within the applicable statute of limitations. The concept of federalism does not protect a litigant who has slept on his rights and has missed the applicable statute of limitations.

Since the Kansas district court sustained Respondent's motion for summary judgment for Petitioner's failure to comply with the statute of limitations, Petitioner has made numerous efforts to "save" his cause of action from that initial mistake:

First, in the Kansas action, in response to Respondent's motion for summary judgment, Petitioner filed motions to transfer the case to New Mexico and to amend his complaint. After Respondent's motion for summary judgment was sustained and prior to the entry of judgment thereon, Petitioner filed a motion requesting the court to specify that its dismissal was "without prejudice." Those efforts were denied and on September 5, 1989, the Kansas court entered its final judgment dismissing Petitioner's claims "with prejudice." The final judgment in Kansas was not appealed by Petitioner.

Second, prior to the entry of judgment in the Kansas case, Petitioner filed two identical cases in state court in New Mexico. The first case was filed on February 20, 1989, and the complaint was amended, but was not served on Respondent. The second case was filed on September 1, 1989 and was served on September 20, 1989. That case was removed to federal district court by Respondent, was dismissed by that court on Respondent's motion on res judicata grounds, and was appealed to the Tenth Circuit. The Tenth Circuit's decision in that

case is now presented by Petitioner for review by this Court.

All of Petitioner's efforts to save his time barred claims have been unsuccessful. This final effort to save his cause of action should likewise be rejected.

2. No split of authority exists in the circuit courts regarding the interpretation of Fed.R.Civ.P. 41(b) by the Tenth Circuit in this case.

Petitioner asserts that "[t]here is a split of authority on the interpretation given Fed.R.Civ.P. Rule 41(b)." (Petition, p. 10) Petitioner's assertion is incorrect. No split of authority exists in the circuits on the controlling issue in this case, i.e., that a dismissal on limitations grounds is a judgment on the merits under Fed.R.Civ.P. 41(b).

All of the circuit courts that have decided this issue have held that a dismissal on statute of limitations grounds is a dismissal on the merits under Fed.R.Civ.P. 41(b). *See Steve D. Thompson Trucking v. Dorsey Trailers*, 870 F.2d 1044 (5th Cir. 1989); *Johnson v. Burnley*, 887 F.2d 471 (4th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1988); *Rose v. Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2nd Cir.), *cert. denied*, 464 U.S. 936 (1983); *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978).

The allegedly contrary authorities cited by Petitioner are either distinguishable or are not circuit court opinions, and no "split of authority" exists in the circuits on this issue. Specifically, Petitioner relies upon *Henson v.*

Columbus Bank & Trust Co., 651 F.2d 320 (5th Cir. 1981); and *Chang v. Northwestern Memorial Hosp.*, 549 F. Supp. 90 (N.D. Ill. 1982) as creating the alleged split of authority. Careful analysis of those cases, however, contradicts Petitioner's argument.

First, the *Henson* case deals solely with the effect of a state court dismissal. That case was not governed by the provisions of Fed.R.Civ.P. 41(b). In *Henson*, the plaintiff originally filed suit in Georgia federal court asserting both federal and state law claims. The federal court refused to exercise pendent jurisdiction over the state law claims. The plaintiff then brought those claims in Georgia state court. The Georgia state court dismissed the plaintiff's state claims on statute of limitations grounds. The Georgia federal court found that the state court's dismissal on limitations grounds was not res judicata as to the plaintiff's federal claims in federal court. *Id.* at 325. Furthermore, the dismissal by the Georgia state court was not governed by the terms of Rule 41(b) of the Federal Rules of Civil Procedure.

Second, *Chang*, is not a circuit court opinion and, in any event, is not contrary to the Tenth Circuit's decision in this case. In *Chang*, the court specifically held that "under Rule 41(b) a dismissal based on the statute of limitations is on the merits." *Id.* at 95. The *Chang* case, therefore, supports Respondent's position, not Petitioner's.

Upon careful review of the cases, no "split of authority" exists among the circuits on the effect of a dismissal on statute of limitations grounds under Fed.R.Civ.P. 41(b). In fact, all of the existing authority fully supports the

decision reached by the Tenth Circuit. Petitioner, however, asks this Court to adopt a construction of Rule 41(b) which is only supported by the dissenting opinion in *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1182 (4th Cir. 1989) (Murnaghan, J., dissenting), and which has not been adopted by any circuit court.

3. This Court's decision in *Costello v. United States* does not mandate a contrary result.

Petitioner also asserts that certiorari should be granted because "the Tenth Circuit disregarded *Costello v. United States*, 365 U.S. 265 (1948) [sic]." (Petition, pp. 5, 6) *Costello*, however, is not on point with this case and did not control the decision below.

Petitioner contends that *Costello* stands for the proposition that a statute of limitations based dismissal falls within the "lack of jurisdiction" exception to Rule 41(b). The actual holding in that case, however, is not nearly so broad. At issue in *Costello* was whether a district court's previous dismissal of a denaturalization proceeding because the government had failed to file an affidavit of good cause should operate as a dismissal on the merits so as to bar a subsequent denaturalization proceeding. The affidavit of good cause was a prerequisite to the initiation of denaturalization proceedings. This Court held that the dismissal of the first action was essentially one "for lack of jurisdiction" within the meaning of the exception under Rule 41(b). *Costello v. United States*, 365 U.S. 265, 285 (1960). This Court added that it regarded the lack of jurisdiction exception as "encompassing those dismissals which are based on a plaintiff's failure to comply with a

precondition requisite to the Court's going forward to determine the merits of his substantive claim." *Id.*

Unlike *Costello*, Petitioner did not fail to comply with any "precondition" to the hearing of his claims in the Kansas district court. The Kansas district court had jurisdiction to make its decision that the Petitioner's claims were time barred and enter its judgment of dismissal. Therefore, the holding in *Costello* does not support Petitioner's position.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. O'CONNOR*
DAVID E. BENGTSON
HERSHBERGER, PATTERSON,
JONES & ROTH
100 S. Main, Suite 600
Wichita, Kansas 67202-3779
(316) 263-7583

ROBERT E. ARROYO
KECK, MAHIN & CATE
8300 Sears Tower
233 S. Wacker Dr.
Chicago, Illinois 60606-6589
(312) 876-3400

Counsel for Respondent
Klein Tools, Inc.

*Counsel of Record